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Teaching Gender As a Core Value in the FirstYear Contracts Class

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TEACHING GENDER AS A CORE VALUE IN THE FIRST-YEAR CONTRACTS CLASS

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I. WHY SHOULD GENDER IDENTITY MATTER TO FIRST-YEAR LAW STUDENTS READING CONTRACTS CASES?

This seems to be an appropriate question with which to begin because it implicates fundamental questions that should be dealt with in the first-year contracts course: what is "the law of contracts," and what distinguishes the types of cases that we study in contracts from the types of cases studied in other first-year courses, like torts or criminal law? As a professor of contracts, I like to set the stage for the course for the first-semester 1L's by distinguishing tort law and criminal law, which confer externally imposed standards of behavior and expectations upon individuals, from contract law, which imposes upon an individual an obligation of precisely no more and no less than the individual undertakes to perform. The trick is getting at the elusive truth as to what parties actually agreed upon when and if they indeed had a "meeting of the minds."

Thus, I explain to my students, when you wake up each morning and get out of bed, whether or not you knowingly consent to be held accountable for any acts or omissions on your part, you will be punished if you commit a crime as the legislature has enumerated it, and you will be civilly liable for any civil wrong or tort that you commit. If you invite guests into your home, you are held to the standard of care that society imposes upon a reasonably prudent host and homeowner; if you walk into a crowded room and spill something on someone, you are held to the standard of a reasonably prudent person, and you may very well have to make your victim whole monetarily—whether or not you knowingly

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consented to undertake such an obligation or to assume such a standard of care. By contrast, when you form a contract—a binding agreement—it is as though you have stepped into a private sphere with the other party, and with nothing save for the parameters of legality and public policy generally to constrain you, you will be "on the hook" for whatever you agree to do while inside that sphere.

The fact and scope of your consent will thus dictate your obligation under the law, but only insofar as it can be recreated and demonstrated to an objective outsider. The dual strands of objective and subjective theory underlying contract interpretation are thus inextricably bound. A trier (a reasonable outsider) must attempt to reconstruct and re-enter that sphere in which the meeting of the minds allegedly took place to ascertain not whether the parties comported with some legislatively or judicially imposed standard of care or behavior, but rather whether they committed, of their own volition, to enter into a contract, and if so, for what. Such a query implicates a search into aspects of psychology and identity that make teaching gender as a core value in a first-year contracts class both natural and necessary.[1]

II. GENDER AND CONSENT

The notion of consent is integral to the law of contracts. Most classes, including mine, cover substantial units on contract formation—ascertaining whether true consent to the deal was given by both parties—and the policing of a bargain—the ways in which a court might undo a deal that has ostensibly been formed because, among other reasons, *true* consent was never given. A court may ask, among other things, whether a deal was made under duress, whether it was the product of the exertion of one party's undue influence over the other, or whether its substantive terms were somehow too oppressively unfair for the deal to have been entered into knowingly and willfully. Such questions' resolutions cannot be divorced from the contexts in which consent is alleged to have been given, and their analyses are thus inextricable from numerous considerations, foremost among which is identity and gender. Having written about gender and consent, I enjoy the opportunity to press my

1. For my class's casebook, I have chosen DAVID G. EPSTEIN ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (2d ed. 2006). I think it is an excellent book for numerous reasons, including its accessibility to beginning students, its inclusion of recent and interesting cases, and its organization of topics.

students to explore—often for the first time—the complex relationships between and among gender, agency, consent, coercion, and the judiciary.

My scholarship has focused on the tendency of the judiciary to rescue women or to perceive that where, for example, they have engaged in sexual relations, they must have actually been seduced in some way or somehow had their will overcome or been deprived of their agency. This notion is moored both in history (my scholarship traces the adultery/seduction cases of centuries past) and in contemporary, often media-fuelled depictions and conceptions of women seeking to be relieved from their own decisions as victims. In class, I often raise the media's depiction of Monica Lewinsky during and in the aftermath of the Bill Clinton scandal to gauge students' views as to whether she, at twenty-one, ought to be seen as a consenting adult or whether she was properly depicted as a young woman seduced by a man who was both older and more powerful than she was. I challenge my students to think about whether and why the litigants in the cases we read are properly deemed to have either given consent or to have had their wills vanquished. I further challenge my students to determine whether courts do women or other groups any favors when they purport to rescue them from what are, in retrospect, deemed to be less than fully informed or volitional decisions. Students often conclude that the ramifications of a purported contract's being revisited because a party to it is deemed to have failed to give true consent can be detrimental to members of the same protected group. Students consistently voice the view that policing such a deal can undercut the protected group's perceived legitimacy in the marketplace, even as it serves to spare the individual at bar the consequences of her purported choice.

Each year, my class reads the trial and appellate-level decisions of *Williams v. Walker-Thomas Furniture Co.*[2] These opinions hinge upon the questions of unconscionability and whether a consumer adequately understood the nature of the contract she was alleged to have entered into with a neighborhood store from which she purchased household items.[3] Each year, I begin class by pointing to the court's opening sentence, "[a]ppellant, a person of limited education separated from her husband, is maintaining herself and her seven children by means of public

2. Williams v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. 1964); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

3. *See Williams*, 198 A.2d at 915–16; *Williams*, 350 F.2d at 447–48.

assistance."[4] We discuss how much of the court's determination was informed by its portrayal and perception of Ms. Williams and her identity. We further discuss the significance and ramifications of the Court of Appeals's determination that "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[5]

Although my contracts students are first-year students, I speak with them about gender and identity, and I discuss my own scholarship dealing with consensual relations in the workplace and the notions of consent, agency, and gender as they interact and apply in that context. Specifically, my work questions sexual-harassment jurisprudence's view that a victim's failure to report hostile work-environment harassment is a conscious choice whose consequences will almost always prove fatal to her legal claim, but a plaintiff's submission to her supervisor in order to retain her job is presumptively coerced and less than volitional. It posits that there is a subconscious desire on the part of those crafting the law to rescue or alleviate from accountability women deemed too powerless to resist the influence and allure of a male boss, and that the effect of such a desire is to infantilize women as a group and to subvert the validity of their consent.[6]

Moreover, in the course of discussing cases in which consent is assessed and evaluating the treatment of groups, like women, who have historically had the validity of their own agency denied, students frequently voice a very basic concept, perhaps best articulated by Professor Hilary M. Schor, in her article, *Storytelling in Washington, D.C.: Fables of Love, Power, and Consent in Sexual Harassment Stories*: "Women do not want to be seduced and they do not want to be loved. They want to be taken seriously, they want their work to be taken seriously, they want their careers to be taken seriously."[7] This sentiment often resonates with students who have thought through the entire dynamic of doctrines like unconscionability being used to undo

4. *Williams*, 198 A.2d at 915.

5. *Williams*, 350 F.2d at 449.

6. *See* Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court Than Those Who Say No . . . and Why They Shouldn't*, 20 YALE J.L. & FEMINISM 25 (2008).

7. Hilary M. Schor, *Storytelling in Washington, D.C.: Fables of Love, Power, and Consent in Sexual Harassment Stories*, 65 S. CAL. L. REV. 1347, 1348–49 (1992).

otherwise valid contracts and the notion that consent was ever given.

III. GENDER, BARGAINING, AND RELIANCE

Contracts students quickly learn that in the absence of true consent, a court may fashion a remedy for a litigant on the basis of demonstrated justifiable reliance. Again, considerations of gender and identity often inform courts' conclusions about reliance and when it may be deemed to have been reasonable or justifiable. Furthermore, students who are taught to read cases for the nuance in the narrative and depictions furnished by the court are more sophisticated students and thinkers. My contracts class always reads the classic case of *Kirksey v. Kirksey*.[8] There, the court held that a widow's relocation of herself and her children in response to her brother-in-law's offer that if she came to see him, he would let her have a place to raise her family, was not supported by reliance justifiable enough to warrant relief when, after two years, he required her to leave the residence he had given her.[9] According to the opinion in that case, his promise was a "mere gratuity" and not something capable of creating a binding, ongoing obligation.[10]

In the context of discussing this case, I raise the issue of gender, and we discuss Professor Debora L. Threedy's hypothesis (conveniently quoted in our contracts casebook and available in her article, *Feminists & Contract Doctrine*[11]), that the outcome of this case may very well have been different if both of the parties had been male, especially when one considers *Kirksey*'s holding alongside that of another often-assigned contracts case, that of *Hamer v. Sidway*[12]:

> When an uncle promised his nephew $5000 if the nephew would refrain from smoking, drinking and gambling until he turned twenty-one, the court concluded they were bargaining; thus, the nephew's refraining constituted consideration and the parties had contracted. When, however, a brother-in-law promised to give his widowed sister-in-law a place to raise her family if she would give up homesteading and move closer to him, the court did not

8. Kirksey v. Kirksey, 8 Ala. 131 (1845).
9. *Id.* at 132.
10. *Id.* at 133.
11. Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1251–53 (1999).
12. Hamer v. Sidway, 124 N.Y. 538 (1891).

> perceive them as bargaining; moving was not consideration and the parties had not contracted. One explanation for these divergent outcomes is that in the first case the intra-familial agreement occurs between two males, while in the latter it occurs between a male and female relation. Bargaining, like beauty, is in the eye of the beholder and judges may be less likely to perceive contract bargaining between the sexes in a family context.[13]

Professor Threedy's contrasting of these two cases, conveniently placed next to one another in our casebook, facilitates a discussion in class about the historic exclusion of women from participation in public life and commerce and the law's corresponding exclusion of women from the realm of contract law. For many students, this is the first time that they have factored these considerations into their synthesis and understanding of caselaw (or history), and it is, I hope, both eye-opening and instructive. My hope is that my students will import these considerations into their other courses of study at Florida International University College of Law.

IV. COURTS' NARRATIVES AND DEPICTIONS OF WOMEN IN CONTRACTS CASES

In the course of teaching contracts cases and raising students' consciousness of the cultural and historical contexts in which bargains are policed and consent is challenged, I point to the ways in which gender influences the identities of women in our cases and the ways in which judges perceive, react to, and respond to those identities. So, for example, when my class reads *Wood v. Lucy, Lady Duff-Gordon*, a case involving a style icon of the early 1900s (and Titanic survivor) who contracted to allow a man the exclusive right to promote her fashion designs and then reneged on her promise,[14] I take a cue from Mary Joe Frug's 1985 classic article, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*,[15] and I challenge the students to view the case's holding and analysis with an eye toward the court's attitude

13. Threedy, *supra* note 11, at 1251–52 (footnotes omitted).

14. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917).

15. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

toward Lady Duff-Gordon, as illustrated by its narrative. In her article, Professor Frug entreated readers to be mindful of the fact that because "[Judge] Cardozo and the editors [of Frug's casebook] do not describe whatever talent, energy, or imagination this woman may have had," and the fact that "the decision's treatment of her legal defense does not redeem the greedy fickleness that her breach of contract suggests," those "readers who are inclined to look to [her] as a role model are likely to observe that as a successful woman she seems undeserving and unethical."[16]

I encourage my students to look at judges' depictions of litigants to discern attitudes, assumptions, or inclinations that might tend to belie or even dictate their true beliefs about what went on in a given case. I urge my students to avoid casting parties to cases in certain roles and to be conscious of Professor Frug's admonition that "[u]tilizing the subordinate status of women as part of doctrinal analysis reinforces the division between the sexes. . . . [and] revitalizes the nefarious contention of gender-related thinking that men are superior to women, and . . . it sometimes rewards readers for extending these ideas to legal analysis."[17] It is gratifying to watch as students become more adept at discerning the various lenses through which jurists view litigants, their circumstances, and their predicaments, as well as more sophisticated when it comes to deriving precisely how a court arrived at a given conclusion.

V. CONCLUSION

As a teacher of first-year law students, I relish the opportunity to introduce students to the skills that they will be honing throughout their careers as law students, and more importantly, as professionals. Along with an appreciation for the close, careful reading of cases and the thoughtful synthesis of caselaw, an understanding of the ways in which parties' identities, and specifically, parties' genders, inform and often predicate the outcomes of cases is a core value from which I believe a contracts student will benefit immensely.

16. *Id.* at 1084.
17. *Id.* at 1102.